83-1384

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JERRY R. TUCKER, SR.

Petitioner,

VERSUS

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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STATEMENT OF ISSUES

1. Whether Section 1 of the Internal Revenue Code imposes a direct or capitation tax upon the person without apportionment in violation of Article I, Section 2, clause 3, and Article I, Section 9, clause 4, of the Constitution of the United States.

2. Whether Section 1 of the Internal Revenue Code imposes a tax upon the person and not upon income as permitted by the Sixteenth Amendment to the Constitution of the United States.

3. Whether the Fifth Circuit Court of Appeals abused its discretion in assessing damages against Petitioner under Fed. R. App.P. 38.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered November 29, 1983, affirming the Judgment of the United States District Court, Western District of Texas, San Antonio Division, entered March 15, 1983.

OPINIONS BELOW

1. The Judgment of United States Court of Appeals for the Fifth Circuit and entered November 29, 1983, as appears in the Appendix hereto.

2. The Judgment of the United States District Court, Western District of Texas, San Antonio Division, entered March 15, 1983, as appears in the Appendix hereto.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 29, 1983. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

The questions raised herein concern three provisions of the Constitution of the United States and Section 1 of the Internal Revenue Code, 28 U.S.C. §1:

> (1) Article I, Section 2, clause 3:
>
> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers....
>
> (2) Article I, Section 9, clause 4:
>
> No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken.

(3) Sixteenth Amendment:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

(4) Internal Revenue Code 28 U.S.C. §1, see Appendix.

STATEMENT OF THE CASE

(1) Course of Proceedings and Disposition in Court Below.

Petitioner, filed suit for refund of taxes paid in 1978, 1979 and 1980. The suit alleged that the income tax rates violate and interfere with taxpayers rights in marital and family relationships and residence and impose a direct or capitation tax without apportionment, in violation of Article I and the Fifth, Ninth, Tenth and Sixteenth Amendments to the Constitution. Petitioner also alleged other violations

of the First and Fifth Amendment, which will not be urged on this appeal. (Rec. 52-67)

Upon the filing of a notice of deficiency for the years 1979 and 1980 by Respondent, hereinafter sometimes referred to as Government, the Court dismissed any claims for 1979 and 1980, but retained jurisdiction of the claim for refund for 1978. (Rec. 106-107)

The Government answered (Rec. 34-35) generally denying Petitioner's allegations. The Government also filed a Motion for Summary Judgment and a Motion to Dismiss, alleging failure to state a claim and seeking dismissal of Petitioner's action. (Rec. 151-152) No affidavits, documents or other evidentiary material were filed in support of this motion.

Petitioner filed a Motion for Summary Judgment upon one issue of the suit: the constitutionality of having four different rate schedules in Section 1 of the Internal Revenue Code resulting in a direct or capitation tax upon individuals based upon marital and family relationships and residence of family members. (Rec. 161-163) Petitioner's Motion was supported by an affidavit showing changes in his own personal marital and family relationships over a four year period and how the different rates as applied related only to marital and family status. (Rec. 164-168).

Petitioner also moved to dismiss without prejudice all issues except those covered by his Motion for Summary Judgment. (Rec. 216-217)

On March 11, 1983, the Trial Court rendered his Memorandum Opinion and Order

denying Petitioner's Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment, dismissing the case with prejudice. (Rec. 232-237) Final Judgment was entered on March 15, 1983. (Rec. 239) Notice of Appeal was filed by Petitioner before midnight on April 15 1983. (Rec. 240)

The Fifth Circuit Court entered Judgment on November 29, 1983, affirming the decision of the Trial Court, per curiam, and awarding damages of $1,000.00 plus costs to Respondent. No petition for rehearing was filed.

(2) Statement of Facts.

Section 1 of the Internal Revenue Code, 26 U.S.C. §1, sets out the amount of tax imposed upon taxable income of (a) married individuals filing joint returns and surviving spouses; (b) heads of household; (c) unmarried individuals

(other than heads of households and surviving spouses); (d) married individuals filing separate returns; and, (e) estates and trusts. Under these rate schedules, the amount of tax on taxable income increases or decreases according to marital status, family relationships, and the residence of spouses or family members. Definitions of these various relationships and qualifications for purposes of determining the applicable rate of tax are contained primarily in 26 U.S.C. §§ 2; 3; 63; 143; 151; 152. There is also what is called a "General Tax Credit" that is determined by marital/family relationship and residence. 26 U.S.C. §42. The only criteria used to determine the applicable rate of tax are: (1) if an individual is married or single; and (2) if an

individual has other individuals living in the same house.

The amended petition (Rec. 52-56) and affidavit (Rec. 164-168) show that in the years 1976 through 1979, Petitioner filed tax returns and qualified to use four of the five rate schedules prescribed by Section 1 of the Internal Revenue Code. The affidavit demonstrates that there is a substantial difference in the amount of tax paid by individuals, depending upon their marital status, family relationship, and residence, without regard to source of income.

The Fifth Circuit Court decided the case on appeal without granting a request by Petitioner for oral arguments before the Court. The Court awarded the Government $1,000.00 damages under Fed.R.App.P.38, but had no hearings or

presentation of evidence to determine the necessity for or amount of such damages.

ARGUMENT AND AUTHORITIES

There are no opinions from the Supreme Court since the establishment of "split income" rates in 1948 which probe into what constitutes a direct tax and the effect of using an income tax rate to obtusely impose a direct tax. In Carroll v. Carroll, 57 U.S. 16 How. 275, 286, Mr. Justice Curtis said:

> ....There must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.

Petitioner prays that this Honorable Court will give taxpayers the benefit of

its "application of the judicial mind to the precise question" which has not in modern judicial history been substantially reviewed or settled by this Court.

I. THE ISSUES AND THE FIFTH CIRCUIT OPINION

The Constitution prohibits the Federal Government from levying a captitation or direct tax upon persons or land without apportionment. Section 1 of the Internal Revenue Code levies income taxes upon individuals at progressive rates. However, because the rates differ according to the marital and family relationship and residence of taxpayers, the income tax rates include an additional tax that is a direct or capitation tax purely upon those relationships just as if they were a separate taxable entity. Until 1948, any attempt to adjust the amount of taxes

paid by taxpayers to reflect household economy differences between married couples and single persons was by way of exemptions and deductions, not an unalterable increase in tax rates. The establishment of separate rates was the result of lack of geographic uniformity effected by state community property laws, instead of allowing for household economies.

Congress and courts have recognized this additional tax as a "penalty." It is triggered solely upon the personal status of being married or unmarried. The law is unconstitutional because this is a direct or capitation tax that is imbedded in the income tax rates without apportionment, and treats familial relationships as a separate taxable entity.

With due respect to the Honorable Justices of the Fifth Circuit, Petitioner feels that the court arbitrarily accused him of disregarding previous authorities on the issues of whether Section 1 of the Internal Revenue Code violates Article I, Section 2, clause 1; Article I, Section 9, clause 4; and the Sixteenth Amendment of the Constitution of the United States. First of all, the District Court, Judge Shannon, addressed these issues in two orders. (A) In his Order on Motion for Summary Judgment, dated December 21, 1982, (Rec. 197) the Court stated:

> The Government contends that it is entitled to Summary Judgment as a matter of law. The cases it cites generally uphold the 'marriage penalty' against due process and equal protection challenges. The cases do not, however, address the relationship between the constitutional prohibition on direct taxation and the Sixteenth Amendment.

He ordered the Government to file a supplemental brief on those issues. (B) The final order and opinion of the District Court (Rec. 232-234) also stated that there were no precedents on these issues and actually found that the income tax rate schedule as structured in Section 1 did contain a direct tax. But the Court cited Nicol v. Ames, 163, U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) to support his opinion that although theoretically includes a direct tax, it could conceivably fit the general scheme of taxation. The Trial Court obviously agreed with Petitioner that these issues have not been adequately addressed in any of the recent circuit court opinions or opinions of this highest court of our land.

The primary authority cited by the Fifth Circuit and by the Government, is

Kellems v. Commissioner, 58 T.C. 556 (1972), aff'd per curiam, 474 F.2d 1399 (2d Cir.), cert. denied, 414 U.S. 831 (1973). The Tax Court in Kellems simply brushed aside the above mentioned issues with a statement that,

> This argument, predicated on the assertion that the 'excess' is a penalty for remaining single, and not an income tax, is without merit. No evidence has been submitted showing the intent of Congress was to regulate or restructure or penalize persons who are not married." (58 T.C. 556 at 558.)

The Tax Court in effect, viewed this argument along the same lines it did the Fifth Amendment due process arguments, i.e., to show a rational basis for classification of taxpayers.

The other two cases cited by the Fifth Circuit, Davidson v. Commissioner, 46 T.C.M. (P-H) ¶77,232 (1977), and Ridgeway v. United States, 41 A.F.T.R.

2d 326 (N.D. Ill. 1977), are hardly probative of the issues. Davidson was a case doomed from inception because Ms. Davidson tried to claim head of household by virtue of being single and having 15 animal pets living with her. Both cases only give a general conclusion similar to that contained in Kellems and rely upon Kellems.

The direct tax arguments under Article I provisions of the Constitution require a careful probing into the structure of the tax rate, regardless of reasons for classification, and do not really involve the balancing of inequities caused by undue restrictions upon rights of taxpayers or justification thereof. Instead, Article I provisions address restrictions on the power of Congress to pass legislation that results in a direct tax that is not apportioned. Pollock v.

Farmers' Loan & Trust Company, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895); Nicol v. Ames, 173 U.S. 509, 43 L.Ed. 786 (1899). The Sixteenth Amendment argument relates to whether rates, or any part thereof, result in a tax upon something other than an economic derivative from a source of income. The Kellems case, in its totality, never discusses either of these propositions.

In the instant case, Petitioner has factually demonstrated by affidavit (Rec. 164-168) that Section 1 of the Internal Revenue Code actually imposes a tax upon his familial relationship as an unmarried head of household in that, in 1978, he had to pay an additional tax, which proved to be 16% above what joint return rates were, simply because the person residing in his household, qualifying him to use head of household rates, was his

son, not a spouse. The affidavit also sets out facts about Petitioner's tax liabilities in other years clearly deomonstrating that there was no other factor, economic or otherwise, that triggered the unavoidable levying of this additional tax.

Outside of the two sentences quoted earlier, the Tax Court in Kellems was addressing the Fifth Amendment due process and classification arguments, not Petitioner's Article I or Sixteenth Amendment arguments. The Fifth Circuit in the instant case, dealing with the differences between married and single rates, erred by failing to distinguish between arguments regarding the restrictions placed on the power of Congress to impose taxes, and the justification for classification of taxpayers. If Section 1 rates, in whole

or in part, have the practical result of levying what is determined to be a direct tax upon persons (personal rights) or property, without a plan of apportionment, the intent of Congress or the rational basis for it is irrelevant. Pollock v. Farmers' Loan & Trust Company, supra.

Even if the Fifth Circuit had properly addressed the Article I and Sixteenth Amendment issues upon the record of the instant case, the Government failed to meet its burden in the face of challenges to the reasonableness of classifications based on marriage. Such classifications are clearly based upon arbitrary assumptions.

There are two things that are absolutely certain regarding the income tax rates set out in Section 1 of the Internal Revenue Code: (1) the annual

establishment of one's marital status significantly affects the amount of taxes to be paid; and, (2) the use of marital status to trigger different rates results in serious inequities, both for married persons and for singles, commonly called "marriage penalties" or "singles penalties".

In the instant case Petitioner's affidavit clearly sets out facts establishing an unnecessary burden placed on taxpayers directly as a result of their relationship to members of a household. The Government failed and refused to respond with any evidence to support conclusory arguments or to demonstrate in any factual manner that there exists no less burdensome means of dealing with household economies or with horizontal equities in taxing married couples. The Government has a burden to

do so. See Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)); Dunn v. Blumstein, 405 U.S. 330, 343; 92 S.Ct. 995, 1003; 31 L.Ed.2d 274 (1975); Johnson v. U.S., 422 F.Supp. 958, 971 (N.D.Ind. 1976).

Congress and the Government have arbitrarily assumed that the event and continuation of the status of marriage by some magic formula creates a greater burden upon the two individuals involved than exists in any other familial relationship that might be established by taxpayers. The bonds and economic impact of familial relationships, without a marriage being involved, contained in one household--and often spilling over into more than one household, as in Petitioner's situation in 1978 as a

result of a divorce--are no less realistic or demanding than the bonds and economic impact of marriage. But Congress, in the face of voluminous evidence to show this, continues to assume that the event and continuation of marriage is the magic key. This is an effort to impose a direct tax on familial relationships.

II. DIRECT AND CAPITATION TAXES

The first questions before the court are these: Does the application of different rates of tax to be paid by individuals, based upon the marital/family status and residence, regardless of the source of income, result in a capitation tax or a direct tax upon the individuals and their enjoyment of a basic, fundamental right of association? If so, is Section 1 of the Internal

Revenue Code, and its related Sections of the Code, repugnant to the Constitution?

A. The Constitution - Direct Taxes:

The questions raised herein concern three provisions of the Constitution of the United States and Section 1 of the Internal Revenue Code, 28 U.S.C. §1:

(1) Article I, Section 2, clause 3:

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers....

(2) Article I, Section 9, clause 4:

> No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken.

(3) Sixteenth Amendment:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Methods of taxation that result in a capitation or direct tax upon the person or land are limited and to be used almost as a last resort. See Hylton v. United States, 3 U.S. 3 Dall. 171 (1:556) (1796); Pollock v. Farmers' Loan & Trust Company, 157 U.S. 429, 39 L.Ed. 759, 15 S.Ct. 673 (1895); Knowlton v. Moore, 178 U.S. 41, 44 L.Ed. 969, 20 S.Ct. 747 (1900); Flint v. Stone Tracy Co., 220 U.S. 107, 55 L.Ed. 389, 31 S.Ct. 342 (1912); Brushaber v. Union Pacific Railroad Company, 240 U.S. 1, 60 L.Ed. 493, 36 S.Ct. 236 (1916).

Corpus Juris Secundum, 85 C.J.S., Taxation §1068, defines a direct or capitation tax as:

> A capitation tax is generally defined as a poll tax or tax on the person simply without regard to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow.

In Knowlton v. Moore, 178 U.S. 41, 47; 44 L.Ed. 969, 972, 31 S.Ct. 342, Justice White said:

> Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange." (Emphasis mine.)

2. Subject and Source of Taxation.

In Knowlton v. Moore, supra, Justice White warned that we must keep clearly in mind just what generates a tax, when considering the applications of progressive rates.

In the instant case, we must keep it clear that it is the occasion of generation of income from some source that is being taxed, not a nonbusiness, non-economic, association. Also, the income tax is assessed annually.

Flint v. Stone Tracy Co., 220 U.S. 107, 55 L.Ed. 389, 31 S.Ct. 342 (1912),

involved a tax imposed upon income of corporations, joint stock companies and certain other business assocations. In determining that this sort of selection or classification was not a direct tax, Justice Day said:

> In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial difference between the mere ownership of property and the actual doing of business in a certain way.
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> ***
>
> ...the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable. (220 U.S. 107, 150-152, 55 L.Ed. 389, 413.) (Emphasis mine.)

A marriage or family relationship, covering generations and a wide degree of consanquinity, is not an income producing

unit. It is a social and moral commitment that is usually formed regardless of source--or even amount--of income. It does not change annually. To make an absolute and unavoidable demand that an individual pay different rates of tax depending upon the relationship of the parties in a household is an annual direct tax upon a social behavior as a separate taxable entity without regard to source of income. A marriage or a divorce in a given year can trigger an increase or decrease in the tax.

At the time of the framing of the Constitution, the southerners and the large land owners all over the country were afraid that Congress would simply assume that by virtue of the fact that they owned slaves or land, they would be better able to pay more taxes. See Hylton

v. United States, 3 U.S. 3 Dall. 171, 177; 1 L.Ed. 556, 559. That very type of reasoning based upon arbitrary assumptions now exists in the income tax rates. Congress for 35 years has arbitrarily assumed that being a single or being married, per se, results in some special advantages and automatically increases or decreases one's ability to pay or one's economic burdens.

The Supreme Court, in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 39 L.Ed. 759, 15 S.Ct. 673 (1895), confirmed restrictions placed on federal direct taxation:

> The requirement of the Constitution is that no direct taxes shall be laid otherwise than by apportionment the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes - and it is admitted that a tax on real estate is a direct tax.... The name of the tax is unimportant....

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> If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls as has been established by repeated decisions of this court.... (Emphasis mine)

The fact that the tax in the instant case is hidden by being included in the form of the rate structure for an income tax does not change the substantive reality of what it is - a direct tax.

3. Sixteenth Amendment

After the decision in Pollock v. Farmers' Loan & Trust Co., supra, economists and politicians, determined to have a broad scale income tax, were successful in bringing to birth the

Sixteenth Amendment. Under the Sixteenth Amendment, a tax can be laid upon income, whatever the source, and the apportionment rule does not have to be applied. This is Justice White's conclusion in Brushaber v. Union Pacific Railroad Company, supra, where he analyzes the Pollock case and the ensuing Sixteenth Amendment. There is no basis in Brushaber or any of the other authorities discussed for expanding the reach of the Sixteenth Amendment to say that a direct tax could be levied through the device of hiding it in different rates that depend solely upon how much property an individual has, uses, or whether or not he or she lives upon that property. That would clearly be a direct tax upon the land itself, not income from the land. So it is with regard to one's

moral and legal status as single or married.

B. Current Income Tax Law.

1. Stare Decisis.

The Trial Court held that the Brushaber case is one of the cases that has decided issues in the instant case. (Rec. 197) That simply cannot be true. The court in Brushaber did not have before it an act of Congress which sought, by use of more than one rate schedule, to impose an additional tax embedded in an income tax upon individuals based purely upon whether they were married or single.

The Trial Court goes on to say that Brushaber upheld the progressive rate of 1913 income tax provisions and that there was no lack of due process by discriminating "between married and single people". However, at that time

there was only one rate schedule. Any differences in burdens between married and single persons were allowed by way of exemptions and deductions, up front, before the tax was computed. Without exception, both before and after the passage of the Sixteenth Amendment, until 1948, any difference in the amount of taxes to be paid by married individuals and those who were single was determined by the allowance of an exemption of a certain amount of income. Once the exemptions were exceeded, everyone paid the same amount of tax. Allowing an exemption is entirely different from establishing a separate unavoidable rate schedule. Other deductions have historically been allowed to cover certain family expenses without establishing entirely different rates. (For

instance, see §§ 210, 211 and 223 of Revenue Acts 1924, 1926 and 1928; also, §§ 11, 12 and 51 of Revenue Acts 1932, 1934, 1936, 1938 and 1939.)

2. Legislative History.

The establishment of more than one rate was a legislative accident and came about after an effort to achieve geographic uniformity. Seven states had community property laws that, as a matter of state law, split the income between spouses. In 1948, Congress passed the "split-income" provisions for filing joint returns. (See 62 Stat. 114.) This change had absolutely nothing to do with "classifying" so as to allow for differences in household economies between marrieds and singles. The greatest concerns of Congress over income-splitting benefits were the loss of revenue to the federal government and

political turmoil by other states threatening to pass community property laws. Then, in 1951, Congress recognized the need to give similar reductions in tax to some widows, widowers, divorcees and other singles with family. Ignoring the fact that the split-income benefits actually resulted in penalty, or additional tax, on singles, regardless of family status, Congress "compromised" and established separate head of household rates, which were lower than the singles rates but higher than the split-income provision for filing joint returns. (See 65 Stat. 480.) Since the rates were higher than the split-income rates for married persons filing jointly, on exactly the same amount of taxable income, it was a "penalty" for not living with a spouse. From 1948 until 1969 there were only two rate schedules, one

for individuals and one for head of household, with the income-splitting being applied to the rate for individuals. (See 83 Stat. 678.) In 1969, the 91st Congress again resorted to the use of separate rate schedules which specifically enforced a different tax to be applied to four segments of taxpayers--those who were single and lived alone; those who were married and lived with a spouse, filing jointly; or filing separately; and those who were single but having someone other than a spouse living with them. An amendment to the 1964 Revenue Act was passed, but was dropped by a joint conference agreement because of revenue reduction problems. (88th Cong. 2d Sess., H.R. 8363, Cong. Rec. 110:2089 et seq. and 110:2134.)

In 1969 Congress openly admitted that the difference between single and married joint return rates was unjustifiable.

See Cong. Rec. 115:36443 and 115:38292; 91st Cong. 1st Sess., Sen. Rept. No. 552.

The result of the 1969 amendments was new rates purposely calculated as nothing more than a compromise. The heart of the problem still existed--the "penalty" exacted by using marital status as the trigger to assess an additional 10% or 20% in revenue. There was never any real attempt to justify the absolutely unfounded assumption that "some difference between the rate of tax paid by single persons and joint returns is appropriate to reflect the additional living expenses of married taxpayers...." Congress continues to purposely calculate an adjustment in the tax rate itself rather than adequately deal with such differences through exemptions and deductions.

The fatal stumbling block again was loss of revenue to the federal government. See statement of Senator Long, Cong. Rec. 115:38293; see also Cong. Rec. 115:38290; 110:2134 et seq.; and, 118:11870 et seq.

In 1972, Senator Packwood pinpointed the illegal element:

> There are nearly 34 million unmarried taxpayers in this nation. They come from all walks of life and cover the entire spectrum of the socioeconomic scale. They share one thing in common: Together they pay $1.6 billion more than their fair share to the Federal Treasury in taxes. There can be no rational reason for continuing this discriminatory tax treatment of our unmarried citizens any longer.
>
> Our Federal tax laws purport to operate on the principle of levying a tax on the income of our citizens. No where in the Federal tax law is there to be formed a passage stating that it is the intent of the U.S. Congress to levy a tax based on the marital status of the taxpayer. That inequity has just been allowed to develop and fester over the nearly 60 years income taxation has been

a way of generating revenues for the Federal Government. (Emphasis mine.) (Cong. Rec. 118:33592.)

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It is only fair that the Federal tax laws recognize the varying living costs as between a family and a single individual. But the income tax laws should reflect such differences in condition and responsibilities by allowing reasonable deductions and exemptions....

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Mr. President, this is the crux of the issue at hand. Once taxable income is determined, the same rate should apply to all who have the same income, regardless of their marital status. To achieve this desirable end, we must reorient our thinking and adjust the focus of our tax laws. (Emphasis mine.) (Cong. Rec. 118:35973-35974.)

Public hearings were conducted in 1972 before the House Committee on Ways and Means on "Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working". (See Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working: Hearings before the House Committee on Ways and

Means, 92d Cong. 2d Sess. (1972), hereinafter referred to as "1972-Report"; see also, Cong. Rec. 118:11872-11881.) The report of those hearings contains 255 pages. In Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982), the Court mentions a statement made at the hearings by Edwin S. Cohen, Assistant Secretary for Tax Policy. The Courts seem to have adopted Mr. Cohen's frustration that, "Both ends of a seesaw cannot be up at the same time." He was referring to keeping progressive rates in effect while preserving split income benefits for married couples in all states, not just community property states. His statement covers only 22 pages of the report. The other 233 pages contain statements of numerous witnesses, including Representatives, suggesting other approaches.

Representative William F. Ryan (N.Y.) summarized the crux of the problem:

> Since 1948, then, there has been a constant pattern of reform leading to new inequities, which again have to be reformed. The pattern is the natural outcome of a tax system which was not based on any consistent policy considerations in the first place. Rather than a clear-cut decision to determine the best way of encouraging the growth and sustenance of the family unit, the 1948 act was the result of a procedural move to equalize tax treatment for citizens of the various States. Although after-the-fact rationales were set forth, the actual effect of the income-splitting benefits have no direct correlation to child rearing. The current procedure makes no differentiation between childless couples preferential treatment over single persons with children to support.
>
> Our graduated income tax system was designed in order to tax everyone on his or her ability to pay. Differing tax schedules based on marital status alone are inconsistent with this principle. The only reasonable, efficient and fair way to provide for differences in condition and responsibilities is by allowing adequate deductions. Once the deductions are made and the

> adjusted gross income determined, the same rate should apply to all who have the same income, regardless of their marital status. (1972 Report, p. 114.)

See also statements by Rep. Donald D. Clancy (Ohio), 1972 Report p. 117; and by Rep. Bella Abzug (N.Y.), 1972 Report p. 122.

The Government always takes the position that the only way to maintain geographic uniformity and horizontal equity for married persons among common law and community property states is to use marriage as the genesis for adjustment in rates. Ironically the sacred cow of geographic uniformity and horizontal equity does not exist for married persons living in community property states who might want to file separately. Income is vested between spouses so that it destroys any advantage that may be gained by filing separately.

However, the Government has managed to work around state laws in other areas to assure horizontal equity, such as, the treatment of alimony. Texas law does not allow permanent alimony. However, divorcing parties can enter into a contract for support to be paid by one party to the other after divorce. The Government has effectively protected the tax policy with regard to alimony through Sections 71 and 215 of the Internal Revenue Code, if the Texas support agreement meets the qualifications of those Sections. There is nothing to prevent married persons in common law states from using contractual relationships regarding property and income to elect to have split income benefits, <u>if</u> Congress would cease making marriage itself a taxable status.

The real excuse for the varying rates came from Mr. Cohen at the 1972 hearings:

> Of course, you have the problem, too, Congressman, which the split income provision was designed to deal with, of the community property States as against the common law States. By providing for income splitting, you eliminated the headaches involved in family partnerships between husband and wife, the problem of the salary being given to the wife out of the family corporation, and the problem of interspousal transfers and gifts which pose quite an administrative difficulty. Income splitting is a much easier administrative system. (Emphasis mine.) (1972 Report, p. 85.)

Congress does not have the power to use this method of taxing, no matter what the scheme or tax policy or administrative easiness. The practical result of the different rates is that it makes the marital or family relationship a "taxable entity," without regard to any other conditions that exist.

The law says that a single taxpayer will pay annually, unalterably, regardless of family obligations not related to marriage, a tax in addition to the income tax paid by a married person filing a joint return not to exceed 20% over the joint return rate. That is a direct tax. It is a capitation tax. If you remain unmarried, you pay a tax annually; if you are married and file a separate tax return, you pay a tax; if you are unmarried, but head of a household, you pay a tax--in each case an unavoidable addition to that paid by a married person filing a joint return.

The Trial Court brushed these arguments aside by saying, without any discussion, that this is not a capitation tax. Then he cites Nicol v. Ames, 173 U.S. 509, as authority to say that in theory we may call part of this so-called income tax

direct, but practical result must control. The practical result that is amply demonstrated by facts of the instant case (Rec. 164-168) is that taxpayers are in fact taxed for their marital/family relationships and residence. This tax is hidden in the income tax by use of a different rate structure that is triggered only by these relationships and residence.

III. Penalties Under Fed.R.App.P.38.

Petitioner respectfully submits to this Court that the Fifth Circuit abused its discretion in making its findings in Paragraph V of its opinion:

> that this case is an appropriate one for the assessment of damages and costs under Fed.R.App.P. 38. We do so because the arguments raised by Tucker are wholly without merit, being supported by no persuasive logic or any relevant authority. Unlike many taxpayers who bring similar broad, pro se challenges to tax laws, Tucker is an attorney: we cannot excuse his failure to take

> cognizance of the appropriate precedents which are uniformly contrary to his position.

Petitioner has already discussed the fact that the District Court found that he had indeed brought forth issues that had not been previously determined by the very same precedents cited by the Fifth Circuit. And, the Trial Court did not rely on a single one of the precendents cited by the Fifth Circuit in his opinion about the direct taxes and Sixteenth Amendment issues. The Fifth Circuit totally ignored the Trial Court's findings and opinion which were evidence that the Trial Court found some merit and persuasive logic in Petitioner's arguments.

Also, Petitioner filed the following Request for Oral Argument with the Fifth Circuit:

> The undersigned, counsel of record, feels strongly that Oral Arguments should be allowed in this case. The issues involve the constitutionality of income tax rates in an area that has been questioned for 35 years, but never in the way in which they are in this case. In the past, it is the feeling of this counsel that the courts have been too eager to pass over some of the arguments in this case without probing deeply enough into legislative and constitutional history. Therefore, I would request that Oral Arguments definitely be allowed so that there may be an exchange between counsel and Court in a thorough probing of these issues.

The Fifth Circuit Court abused its discretion under Fed.R.App.P. 38 by ignoring Petitioner's Request for Oral Argument. It also ignored the Trial Court's opinion and its rejection of the Government's contention that Petitioner had filed a frivolous suit. It also discriminated against Petitioner as a lawyer. The role of a lawyer is to temper the steel of justice with the fire

of professional advocacy. Petitioner did nothing more than that.

The record on appeal demonstrates a thorough effort in research and analysis of judicial and legislative history aimed squarely at distinct propositions which have never been the subject of a probative substantive opinion in the Federal Appeallate Courts. It certainly was not frivolity! And it is not with frivolity that Petitioner approaches this Honorable Court. Petitioner urges this Court to order that the entire record be certified for review so that the Court may see that Petitioner has proceeded to this point in good faith, exercising professional judgment based upon over twenty years as a trial lawyer.

The least the Fifth Circuit could have done was to grant the Request for Oral Argument and give a professional colleague an opportunity to demonstrate,

face to face, the fine distinctions of law, if the Court did not see them. In effect, the Fifth Circuit held Petitioner in contempt for disagreeing with interpretation of law as a professional without ever giving him a show cause hearing. Such a procedure should be condemned.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit erred in affirming the judgment of the United States District Court, Western District of Texas.

The facts in this case are undisputed. Petitioner presented by pleadings, supported by affidavit, facts which clearly show that Section 1 of the Internal Revenue Code attempts to levy a capitation or direct tax without apportionment. Respondent presented no factual information by pleadings or any

other documents to support whatever theory it uses to show that the practical result is otherwise. This tax law is unconstitutional in that it violates Article I, Section 2, clause 3, and Article I, Section 9, clause 4, and the Sixteenth Amendment of the Constitution.

Legislative history demonstrates that Congress recognizes that it is sustaining a "penalty", adding an additional tax, which relates solely to marital status. Congress also recognizes that adjustments for differences in household economies should be handled by exemptions and deductions. However, the use of separate rates unalterably fixes additional tax revenue for those having to use the "penalty" rates. The pattern has always been that Congress will not rectify a wrong like this, with revenue loss or

administrative ease at stake, until the courts and public pressure force that move. This court should reverse the decision of the Fifth Circuit and the Trial Court and order judgment for the Petitioner, awarding a refund of all taxes paid in 1978 and declaring Section 1 of the Internal Revenue Code unconstitutional.

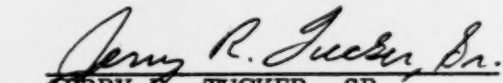
The Fifth Circuit abused its discretion in assessing penalties against Petitioner under Fed.R.App.P. 38. The award of $1,000.00 damages and cost should be reversed.

PRAYER

WHEREFORE, Petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, and all

parties hereto, granting such relief as Petitioner may be entitled to, at law or in equity.

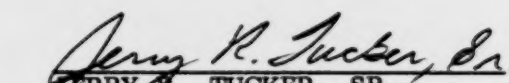
Respectfully submitted,



JERRY R. TUCKER, SR.
1010 N. St. Mary's,
Rm 1403
San Antonio, Texas 78215
(512)222-3784
TX State Bar No.20273000
Pro se and as Attorney
for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Petition for Writ of Certiorari has been sent to the Solicitor General, Department of Justice, Washington, D.C. 20530, by certified mail, return receipt requested, on this the 9th day of February, 1984.



JERRY R. TUCKER, SR.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1252

Summary Calendar

D.C. Docket No. SA-81-CA-629

JERRY R. TUCKER, SR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
Before CLARK, Chief Judge, RUBIN and JOLLY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 29, 1983

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFT CIRCUIT

No. 83-1252

Summary Calendar

JERRY R. TUCKER, SR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court

for the Western District of Texas

(November 29, 1983)

Before CLARK, Chief Judge, RUBIN and JOLLY, Circuit Judges.

PER CURIAM:

The taxpayer, Jerry Tucker, Sr., a lawyer proceeding pro se, filed suit for a refund of his federal income taxes paid for 1978. The district court granted the motion of the Commissioner of the Internal Revenue Service

for summary judgment, rejecting Tucker's constitutional challenges to the Internal Revenue Code (IRC). We affirm.

I.

Tucker was a single head of household with one dependent living with him during the year 1978. He filed a tax return for that year and paid the tax due. On Novmeber 25, 1981, Tucker filed an amended return, requesting a refund in the amount of $7,514.77, his entire tax burden for 1978. On that amended return, Tucker stated that he was revising his return because I.R.C. §1 and related provisions were unconstitutional. His claim for a refund was denied by the IRS in a letter dated February 3, 1982.

Tucker first sued for a refund of his federal income taxes paid for the years 1979 and 1980 in the United States District Court for the Western District of Texas. His amended complaint added the tax year 1978 to the refund

suit. Tucker alleged that he was entitled to a refund because of unconstitutionality of the Internal Revenue Code, 26 U.S.C. §1 and related provisions. Since Tucker had filed a petition contesting a Notice of Deficiency sent to him by the IRS for the years 1979 and 1980, the district court dismissed the complaint and relinquished jurisdiction to the Tax Court with respect to these years pursuant to I.R.C. § 7422(e), but it retained jurisdiction over the 1978 claim.

On the cross motions for summary judgment,[1] the district judge dismissed Tucker's complaint with prejudice. The court rejected Tucker's argument that I.R.C. §1, which assigns different rate schedules to individuals based on their marital status, constitutes a direct tax upon people who are single heads of

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[1]Tucker's motion to dismiss without prejudice paragraphs 13-23 of his amended complaint was also denied by the trial court.

households. The district court also rejected Tucker's contentions that the IRC is unconstitutionally vague and that the charitable deductions provisions of the code violate the first amendment.

II.

First we note that although Tucker has sued for a refund of all the tax he paid for 1978, under the premise of his first argument, he would be entitled to a refund of that portion of the tax which is attributable to his filing status, that is, only the excess over what he would have paid as a married person.

Tucker maintains that the varying rate schedules of IRC §1 produce a direct tax on individuals and their enjoyment of associational rights and that this direct tax is unconstitutional because it is not apportioned among the states as is required by the constitution.[2] This argument is

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[2]U.S. Const. art. I, §2, cl. 3, §9, cl. 4.

conceptually indistinguishable from challenges raised by other taxpayers to the "singles tax." Courts have uniformly held that the additional tax paid by non-married individuals is a valid and inseparable part of the income tax, insulated by the sixteenth amendment from the apportionment requirement, and not a direct tax. In Kellems v. Commissioner,[3] the tax court rejected the same argument that Tucker now raises. See Ridgeway v. United States, 41 A.F.T.R. 2d 326 (N.D.Ill. 1977); Davidson v. Commissioner, 46 T.C.M. (P-H)¶77,232(1977). As the tax court reasoned, the rate structure of section 1 is rationally related to important goals of the income tax system as a whole, and it should not be viewed as a penalty for remaining unmarried: "It is conceivable Congress believed that married persons generally have greater financial burdens than single persons. The recognition of such

greater burdens is certainly consonant with taxation based on the ability to pay, which has long been an important objective of the income tax scheme." Kellems, 58 T.C. at 559. Nothing in Tucker's pleadings or arguments persuades us that the rate structure of section 1 is without a rational basis.

Broad challenges to the rate structure of I.R.C. §1 have been made by numerous taxpayers on grounds similar to those raised by Tucker. This circuit has adopted a Tax Court opinion which stated that "perfect equality between persons subject to the Internal Revenue Code is not a constitutional requirement." Cash v. Commissioner, 580 F.2d 152, 155 (5th Cir. 1978). Cash cites with approval the opinion of the Seventh Circuit in Barter v. United States, 550 F.2d 129 (7th Cir. 1977), aff'g per curiam,

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[3] 58T.C. 556(1972), aff'd per curiam, 474 F.2d 1399 (2d Cir.), cert.denied, 414 U.S. 831 (1973).

422 F.Supp. 958 (N.D. Ind. 1976). The court in Barter held that the "marriage penalty" created by section 1 does not violate any constitutional rights. See also Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982), cert.denied 103 S.Ct. 2429(1983). Not only does the appellant fail to cite any relevant authority in support of his attack on section 1, he fails to present any reasons why we should ignore the precedential decisions from this circuit and from other federal courts.

III.

Tucker also contends that the "gross uncertainty and vagueness of the Internal Revenue Code" violate his constitutional rights to due process and equal protection. He fails to cite any particular section or sections of the Internal Revenue Code which operate to deprive him of his rights; rate, "the unconscionable lack of notice of the rights and responsibilities of anyone under the tax

system" violates due process. Tucker argues that the Code is unfair because it is so complex that even he, a lawyer, cannot fully understand it and because it forces taxpayers to rely on professionals to fulfill their statutory obligations. The system, he argues, creates a special class of citizens -presumably those who can afford professional accountants - "who can pay a premium to avail themselves of the discriminatory privilege of shifting the tax burden to those citizens who cannot avail themselves of such privilege."

The standard of review in this circuit governing due process challenges to a taxing statute is "whether the taxing statute is so arbitrary and capricious as to amount to a denial of due process." Pledger v. Commissioner 641 F.2d 287, 292 (5th Cir. 1981). Moreover, the courts must give great deference to the statutory scheme devised by Congress and

leave it undisturbed "unless arbitrary and capricious and without a reasonable basis in fact." Id. Clearly, under such a standard, a due process challenge cannot be sustained merely on the basis of conclusory and general allegations. It is frivolous for Tucker to argue that we should declare the entire Internal Revenue Code unconstitutional absent concrete allegations of specific deprivations of his rights.

IV.

Finally, Tucker argues that the Internal Revenue Code violates the Establishment Clause and the Free Exercise Clause because it denies him tax benefits "because, in accordance with his own religious beliefs, he elects to give to those who need help individually rather than make donations to designated organizations...." The argument that Tucker raises was rejected by the Second Circuit in Winters v. Commissioner, 468 F.2d 778, 781 (2d Cir. 1972). See also

Parker v. Commissioner, 365 F.2d 792, 795 (8th Cir. 1966). We, too, find this claim to be without merit. Tucker has made no showing that the guidelines upon which exempt organizations are chosen are in violation of the first amendment.

V.

For the reasons set forth above we affirm the opinion of the district court dismissing Tucker's complaint. In addition, we hold that this case is an appropriate one for the assessment of damages and costs under Fed.R.App.P. 38. We do so because the arguments raised by Tucker are wholly without merit, being supported by no persuasive logic or any relevant authority. Unlike many taxpayers who bring similar broad, pro se challenges to tax laws, Tucker is an attorney: we cannot excuse his failure to take cognizance of the appropriate precedents which are uniformly contrary to his position.

This court in Lonsdale v. Commissioner, 661 F.2d 71, 72 (5th Cir. 1981), warned furture tax litigants that the "continued advancing of these long-defunct" constitutional arguments invites the sanctions of Fed.R.App.P. 38. Though the court did not impose costs on the pro se appellants in that case, it did impose sanctions on the pro se appeallants in Knighten v. Commissioner, 702 F.2d 59 (5th Cir.)(per curiam), cert. denied, 52 U.S.L.W. 3291 (U.S. Oct. 11, 1983) (83-5281). We award the government its costs in prosecuting the appeal as well as $1,000 in damages to defray attorney's fees. The judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

JERRY R. TUCKER, SR.,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO.
	§	SA-81-CA-629
UNITED STATES OF AMERICA,	§	
	§	
Defendant.		

JUDGMENT

This action came on for consideration before the Court, and the issues having been duly considered;

It is, therefore, ORDERED, ADJUDGED and DECREED that this case be dismissed without prejudice.

Signed this 15th day of March, 1983.

/s/ Fred Shannon
Fred Shannon,
United States
District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

JERRY R. TUCKER, SR.,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO.
	§	SA-81-CA-629
UNITED STATES OF AMERICA,	§	
	§	
Defendant.		

MEMORANDUM OPINION AND ORDER

Plaintiff contends that the "marriage penalty" contained in 26 U.S.C. § 1 for the tax year 1978 imposes a direct tax, unrelated to income, in violation of the Constitutional requirement of apportionment. The facts are not in dispute. Plaintiff moves for Summary Judgment. Defendant moves to dismiss. Plaintiff also moves for dismissal without prejudice of certain issues.

I.

The Constitution recognizes two classes of taxation, direct and indirect, and lays down

two rules by which their imposition must be governed: The rule of apportionment as to direct taxes and the rule of uniformity as to duties, imposts, and excises. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429. The early case of Scholey v. Rew, 23 Wall. 331, posed, but did not decide, the question "whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land." It is apparent that the "marriage penalty" found in 26 U.S.C. § 1 is not a capitation tax. Only those married couples with taxable income are taxed. Pollock held taxes on income from real and personal property were direct taxes and (at that time) prohibited without apportionment. The Sixteenth Amendment removed the apportionment requirement from all taxes on income, from whatever source derived. Brushaber v. Union Pacific Railroad, 240 U.S. 1, sustained a due process challenge to the

progressive tax rate of the 1913 income tax provisions. Also, want of due process was not found in provisions discriminating "between married and single people."

Plaintiff contends that the 26 U.S.C. § 1 difference in taxes paid on income is a direct tax based upon the legal status of the taxpayer. This difference in tax paid, which at certain income levels results in the "marriage penalty", is based on a characterization of individuals in 26 U.S.C. § 1 that is unrelated to income. Thus, the unfavorable variance becomes a direct tax on the fundamental right to marry and not on income from whatever source derived.

Defendant has failed to cite any case addressing this constitutional challenge to the "marriage penalty" based on the theory that it is a direct tax, unrelated to income, and subject to the rule of apportionment. Justice

Peckham, in Nicol v. Adams, 173 U.S. 509, provided a guideline to courts deciding the validity of a tax.

> "As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when, as a practical matter pertaining to the actual operation of the tax, it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door; and, for the purpose of deciding upon its validity, a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy." 515-516

This guideline was cited with approval by Justice White in Knowlton v. Moore, 178 U.S. 41.

It is unquestionably the purview of a court to determine whether a tax is direct and guided

by the "practical results" criteria of Nicol, I find:

Congress can tax income from whatever source derived without apportionment. Congress grants a myriad of adjustments to the income subject to tax. Exemptions from income are allowed to the taxpayer, for his spouse and dependent children, and if he is over 65 or blind. Income is adjusted by allowable expenses to determine taxable income. The filing status of the taxpayer determines which tax rate will be imposed. Once the tax is determined certain credits are allowed qualified taxapyers and other taxes can be imposed. It is the filing status portion that is the crux of Plaintiff's complaint. Filing status is unrelated to income. However, the exemptions from income granted by Congress are unrelated to income and reflect public policy. Many expenses allowed as deductions are unrelated to income (i.e. penalty on early

withdrawal of savings; charitable contributions). Most credits allowed are related to outlays and not income (i.e. political contributions, energy and investment credits). The fact that filing status is unrelated to income does not of itself transform it into a direct tax upon a taxpayer "penalized" by that status. An exemption from income granted to the blind taxpayer is not a direct tax upon the sighted taxpayer.

Prior to 1948, income was taxed on an individual basis without regard to marital status. This was changed to close a loophole whereby married couples residing in community property states were able to split the community income thereby enjoying lower tax rates. The 1969 Tax Reform Act did create a "marriage penalty" for married tax payers with certin income levels. The tax schedules in 26 U.S.C. § 1 were found reasonably related to the constitutional objective of the Sixteenth

Amendment. Mapes v. United States, 576 F.2d 896 (Ct. of Claims 1979) cert. denied 439 U.S. 1046.

II.

Plaintiff moves to dismiss without prejudice issues raised by paragraphs 13 through 23 of Plaintiff's First Amended Original Petition.

Paragraph 13 contends Sec. 100 of the IRS Law Enforcement Manual IX (guidelines regarding criminal prosecution) constitutes discriminatory enforcement in violation of equal protection and due process.

Paragraphs 14 through 20 basically state that 26 U.S.C. §§ 1-1561 are unconstitutionally vague, fail to put Plaintiff on notice of his rights and responsibilities thereby creating "taxation by confusion, fear and intimidation" in denial of due process and equal protection.

Paragraph 21 through 23 contend that deductions from income granted only to

recognized religious institutions is an unconstitutinal advancement of religion.

A decision to prosecute is largely unreviewable by the Courts. United States v. Cox, 342 F.2d 167 (5th Cir. 1965). "Incident to the Constitutional separation of power, the Courts have no jurisdiction to interfere with the free exercise of the discretionary powers of the attorneys of the United States and their control over criminal prosecutions." Zimmerman v. Spears, 428 F.Supp. 759 (W.D. Tex. 1977).

Cases sustaining due process and equal protection challenges to the Internal Revenue Code include Brushaber, supra and Mapes, supra. The Internal Revenue Code and regulations are complex and often difficult to understand but there is no authority to suggest they constitute an unconstitutional taking of property. Swallow v. United States, 325 F.2d 97 (10th Cir. 1963) cert. denied 377 U.S. 951. There is no substance to Plaintiff's contention

that the Internal Revenue Code violates the establishment of religion clause of the First Amendment. Swallow, supra. Plaintiff's allegations in paragraphs 13-23 have been litigated and found adverse to his contentions.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendant's Motion to Dismiss or for Summary Judgment be, and the same is hereby GRANTED and this case is dismissed with prejudice. Plaintiff's Motion for Summary Judgment is DENIED.

Signed this 15th day of March, 1983.

/s/ Fred Shannon
Fred Shannon
United States
District Judge

§ 1. Tax imposed

(a) Married individuals filing joint returns and surviving spouses. —There is hereby imposed on the taxable income of—

(1) every married individual (as defined in section 143) who makes a single return jointly with his spouse under section 6013, and

(2) every surviving spouse (as defined in section 2(a)), a tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $3,200	No tax.
Over $3,200 but not over $4,200	14% of the excess over $3,200.
Over $4,200 but not over $5,200	$140, plus 15% of excess over $4,200.
Over $5,200 but not over $6,200	$290, plus 16% of excess over $5,200.
Over $6,200 but not over $7,200	$450, plus 17% of excess over $6,200.
Over $7,200 but not over $11,200	$620, plus 19% of excess over $7,200.
Over $11,200 but not over $15,200	$1,380, plus 22% of excess over $11,200.
Over $15,200 but not over $19,200	$2,260, plus 25% of excess over $15,200.

and so forth

(b) Heads of households.—There is hereby imposed on the taxable income of every individual who is the head of a household (as defined in section 2(b)) a tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,200	No tax.
Over $2,200 but not over $3,200	14% of the excess over $2,200.
Over $3,200 but not over $4,200	$140, plus 16% of excess over $3,200.
Over $4,200 but not over $6,200	$300, plus 18% of excess over $4,200.
Over $6,200 but not over $8,200	$660, plus 19% of excess over $6,200.
Over $8,200 but not over $10,200	$1,040, plus 22% of excess over $8,200.
Over $10,200 but not over $12,200	$1,480, plus 23% of excess over $10,200.
Over $12,200 but not over $14,200	$1,940, plus 25% of excess over $12,200.
Over $14,200 but not over $16,200	$2,440, plus 27% of excess over $14,200.

and so forth

(c) Unmarried individuals (other than surviving spouses and heads of households).—There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b)) who is not a married individual (as defined in section 143) a tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,200	No tax.
Over $2,200 but not over $2,700	14% of the excess over $2,200.
Over $2,700 but not over $3,200	$70, plus 15% of excess over $2,700.
Over $3,200 but not over $3,700	$145, plus 16% of excess over $3,200.
Over $3,700 but not over $4,200	$225, plus 17% of excess over $3,700.
Over $4,200 but not over $6,200	$310, plus 19% of excess over $4,200.
Over $6,200 but not over $8,200	$690, plus 21% of excess over $6,200.
Over $8,200 but not over $10,200	$1,110, plus 24% of excess over $8,200.
Over $10,200 but not over $12,200	$1,590, plus 25% of excess over $10,200.
Over $12,200 but not over $14,200	$2,090, plus 27% of excess over $12,200.
Over $14,200 but not over $16,200	$2,630, plus 29% of excess over $14,200.

and so forth

(d) Married individuals filing separate returns.—There is hereby imposed on the taxable income of every married individual (as defined in section 143) who does not make a single return jointly with his spouse under section 6013 a tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $1,600	No tax.
Over $1,600 but not over $2,100	14% of the excess over $1,600.
Over $2,100 but not over $2,600	$70, plus 15% of excess over $2,100.
Over $2,600 but not over $3,100	$145, plus 16% of excess over $2,600.
Over $3,100 but not over $3,600	$225, plus 17% of excess over $3,100.
Over $3,600 but not over $5,600	$310, plus 19% of excess over $3,600.
Over $5,600 but not over $7,600	$690, plus 22% of excess over $5,600.
Over $7,600 but not over $9,600	$1,130, plus 25% of excess over $7,600.
Over $9,600 but not over $11,600	$1,630, plus 29% of excess over $9,600.
Over $11,600 but not over $13,600	$2,190, plus 32% of excess over $11,600.
Over $13,600 but not over $15,600	$2,830, plus 36% of excess over $13,600.
Over $15,600 but not over $17,600	$3,550, plus 39% of excess over $15,600.

and so forth

(e) Estates and trusts.—There is hereby imposed on the taxable income of every estate and trust taxable under this subsection a tax determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $500	14% of the taxable income.
Over $500 but not over $1,000	$70, plus 15% of excess over $500.
Over $1,000 but not over $1,500	$145, plus 16% of excess over $1,000.
Over $1,500 but not over $2,000	$225, plus 17% of excess over $1,500.
Over $2,000 but not over $4,000	$310, plus 19% of excess over $2,000.
Over $4,000 but not over $6,000	$690, plus 22% of excess over $4,000.
Over $6,000 but not over $8,000	$1,130, plus 25% of excess over $6,000.
Over $8,000 but not over $10,000	$1,630, plus 28% of excess over $8,000.
Over $10,000 but not over $12,000	$2,190, plus 32% of excess over $10,000.
Over $12,000 but not over $14,000	$2,830, plus 36% of excess over $12,000.
Over $14,000 but not over $16,000	$3,550, plus 39% of excess over $14,000.

and so forth

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